FILED
MAY 20 1991
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No. 90-1473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOANNE KOTLER, Individually and as Administratrix of the Estate of GEORGE P. KOTLER,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, and LIGGETT GROUP INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, and consequently this Court, lack jurisdiction over petitioner's challenge to the District Court's May 1988 ruling, which held that the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1988), preempted various state tort claims, because petitioner failed to preserve the issue for appeal pursuant to Federal Rule of Appellate Procedure 3(c).

2. If this Court finds that the Court of Appeals did have jurisdiction, the question presented is whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1988), permits courts to impose liability under state law in personal injury lawsuits for alleged inadequacies in the warning label or alleged improprieties in the advertising or promotion of properly labeled cigarettes. The question is similar to that raised in *Cipollone* v. *Liggett Group Inc.*, No. 90-1038 (*cert. granted* March 25, 1991).

3. Whether this Court should issue a writ of *certiorari* to review purely state law questions, *i.e.*, the Court of Appeals' interpretation of Massachusetts products liability law.

PARTIES

The petitioner for this writ of *certiorari* is Joanne Kotler, individually and as administratrix of the estate of George P. Kotler, appellant below. Respondents are three cigarette manufacturers: The American Tobacco Company, Philip Morris Incorporated, and Liggett Group Inc., appellees below. All the subsidiaries of American Brands, Inc., the parent of respondent The American Tobacco Company, are wholly owned. All the subsidiaries of Philip Morris Companies, Inc., the parent of respondent Philip Morris Incorporated, are wholly owned. Respondent Liggett Group Inc., which has changed its name to Brooke Group Ltd., has three subsidiaries that are not wholly owned: MAI Systems Corporation, New Valley Corporation, formerly known as Western Union Corporation, and Liggett & Myers Tobacco Company of Canada Limited.

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Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A38) is reported at 926 F.2d 1217. The District Court's opinion of May 2, 1988 (Pet. App. A54-A62) is reported at 685 F. Supp. 15. The District Court's opinion of November 21, 1989 (Pet. App. A50-A53) is reported at 731 F. Supp. 55. The District Court's opinion of January 12, 1990 (Pet. App. A39-A49) is reported at 731 F. Supp. 50.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1990. The petition for a writ of *certiorari* was filed on March 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). However, as discussed *infra*, this Court lacks jurisdiction to hear the central issue presented in the petition.

STATUTE INVOLVED[1]

Federal Rule of Appellate Procedure 3(c) states, in pertinent part, as follows:

> *Content of the Notice of Appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT

This is a products liability action instituted by Joanne Kotler against respondents The American Tobacco Company ("American"), Philip Morris Incorporated ("Philip Morris") and Liggett Group Inc. ("Liggett"). Petitioner alleged that George P. Kotler developed lung cancer because, for some 40 years, he smoked cigarettes manufactured by respondents. Petitioner asserted numerous causes of action, including negligent failure to warn, breach of warranty,[2] and misrepresentation. In November of 1987, respondents filed motions to dismiss petitioner's claims on state law grounds and on the ground that claims based on alleged inadequacies in the warning label or alleged improprieties in the advertising or promotion of cigarettes were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.*

On May 2, 1988, the District Court granted respondents' motions in part, dismissing on preemption grounds

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[1] If this Court determines that it has jurisdiction to hear the preemption issue, the statute involved would be the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340.

[2] Under Massachusetts products liability law, "breach of warranty" is intended "to be fully as comprehensive as the strict liability theory of recovery . . . adopted by a great many other jurisdictions." *Back* v. *Wickes Corp.*, 375 Mass. 633, 639, 378 N.E.2d 964, 968 (1978).

petitioner's post-1965 warning and misrepresentation claims. (Pet. App. at A62.) Petitioner remained free to pursue claims based on pre-1966 conduct, but only against respondent American because Mr. Kotler did not smoke brands manufactured by Liggett or Philip Morris prior to 1966. The District Court also held that petitioner could pursue a claim for design defect against all respondents. (Pet. App. at A61-A62.)

On November 21, 1989, the District Court granted the motion of Philip Morris and Liggett for summary judgment on the design defect claim because petitioner could offer no evidence of an alternative design that would have avoided the harm. (Pet. App. at A50-A53.) Since design defect was the only claim remaining against Philip Morris and Liggett, that effectively ended the case for those respondents. However, no judgment was entered in favor of Philip Morris or Liggett at that time. Petitioner filed a premature notice of appeal as to Philip Morris and Liggett on December 11, 1989.

On January 12, 1990, the District Court granted American's motion for summary judgment on petitioner's design defect and misrepresentation claims.[3] (Pet. App. at A39-A49.) On February 12, 1990, the case proceeded to trial against American on the pre-1966 failure to warn claims sounding in both negligence and breach of warranty.

At the close of petitioner's case, on February 28, 1990, the District Court directed a verdict for American on the

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[3] To the extent petitioner suggests that, were it not for the Court of Appeals' preemption ruling, petitioners could have pursued at trial a claim against American for misrepresentation (*see* Pet. at 14-15), such an assertion is false. Petitioner's misrepresentation claim against American was dismissed by the District Court on factual grounds wholly unrelated to preemption. The court found that there was no evidence that the advertisements proffered by petitioner in support of her misrepresentation claim were "either related to health or untrue." (Pet. App. at A41-A42.)

breach of warranty claim. On March 7, 1990, the jury returned a unanimous general verdict in favor of American on plaintiff's sole remaining claim, negligent failure to warn. The court entered final judgment for American (but not Philip Morris or Liggett) on March 8, 1990.

On March 16, 1990, plaintiff filed a motion for a new trial, which was denied on March 20. On March 26, 1990, final judgment was entered for Philip Morris and Liggett. Three days later, on March 29, 1990, plaintiff filed a notice of appeal solely as to American (Appendix 1a) and on April 24, 1990, filed another notice of appeal against Philip Morris and Liggett. (Appendix 3a.) Although the two notices designated particular orders or parts of orders of the District Court from which the appeal was being taken, neither notice designated the District Court's May 1988 preemption ruling.

The Court of Appeals recognized that it was "faced with the threshold issue of whether the two notices of appeal which Kotler filed sufficiently designated the lower court's preemption ruling as a subject for appellate inquiry." (Pet. App. at A5.) The court indicated its view that the preemption issue was not included in the notices of appeal, but stopped short of a definitive holding:

> While we tend to think that the appellant fell short of meeting her burden in this respect, we hesitate to decide so bitterly contested a controversy by drawing conclusions about intent and reliance from an imperfectly delineated record. We take shelter instead under the familiar principle that where an appeal presents a difficult jurisdictional issue, yet the substantive merits underlying the issue are facilely resolved in favor of the party challenging jurisdiction, the jurisdictional inquiry may be avoided.

(Pet. App. at A6.) The Court of Appeals affirmed the District Court's preemption and state law rulings in favor of respondents. (*See* Pet. App. at A7-A11, A15.)

ARGUMENT

I. THIS COURT SHOULD NOT GRANT THE PETITION AS TO THE PREEMPTION ISSUE BECAUSE PETITIONER FAILED TO PRESERVE THE ISSUE FOR APPEAL

Petitioner omitted the District Court's May 1988 preemption ruling in her notices of appeal and thus failed to preserve the preemption issue for appeal. Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "designate the judgment, order or part thereof appealed from." The rule is mandatory and jurisdictional. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315-316 (1988); *State Trading Corp. of India, Ltd.* v. *Assuranceforeningen Skuld*, 921 F.2d 409, 412 (2d Cir. 1990).

Compliance with Rule 3(c)'s judgment-designation requirement "is to be construed 'in light of all the circumstances.'" *Firstier Mortgage Co.* v. *Investors Mortgage Insurance Co.*, —— U.S. ——, ——, 111 S. Ct. 648, 653 n.6 (1991) (quoting *Torres*, 487 U.S. at 316). Thus, courts have examined the record to determine whether the notice filed provides "the functional equivalent of what the rule requires," *Torres*, 487 U.S. at 317, and whether the intent to appeal from a specific judgment was "manifest." *Foman* v. *Davis*, 371 U.S. 178, 181 (1962).

Here, petitioner's various notices of appeal manifest an intent *not* to appeal from the District Court's May 1988 preemption ruling. Petitioner's notice of April 24, 1990, from judgment entered for Philip Morris and Liggett, designated the following:

> 1) decision of Judge Skinner of November 21, 1989 granting the Motion of the Defendant, Philip Morris for Summary Judgment, from which judgment entered on March 26, 1990;
>
> 2) decision of Judge Skinner on November 21, 1989 granting the Motion of the Defendant, Liggett

Group, Inc. for Summary Judgment, from which judgment entered on March 26, 1990;

3) limitation of discovery as to Philip Morris and Liggett Group, Inc.; and

4) preclusion of the many theories of defective product, risk utility and/or consumer expectation as to Philip Morris and Liggett.

(Appendix 3a-4a.) Petitioner's notice of March 29, 1990, from judgment entered for American, designated:

1) Interlocutory order of January 12, 1990 precluding Plaintiff's risk utility or defective product claim;

2) Order entered by Judge Skinner on February 28, 1990 granting the Motion of the Defendant, American Tobacco Company for a Directed Verdict on the Plaintiff's breach of warranty claim; and

3) From the final judgment entered on behalf of Defendant The American Tobacco Company on March 8, 1990, based on the divers [sic] rulings of the Court, Jury Instructions, venire and jury selections and verdict of the jury in favor of the Defendant on the negligence count.

(Appendix 1a-2a.)

The notices thus list separate and specific rulings of the District Court, but contain no reference to the May 1988 ruling or the claims held to be preempted—misrepresentation and failure to warn. By affirmatively listing certain rulings of the District Court, petitioner manifested an intent to exclude others, including the preemption order of May 1988. *See, e.g., Chaka* v. *Lane*, 894 F.2d 923, 925 (7th Cir. 1990); *Brandt* v. *Schal Associates, Inc.*, 854 F.2d 948, 954 (7th Cir. 1988); *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981).[4]

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[4] Nor does anything in petitioner's notices or the record serve as the functional equivalent of a notice to appeal the May 1988 ruling or indicate that a technical error was made.

None of petitioner's arguments to the contrary withstand scrutiny:

1. Petitioner claims that the fourth entry in the April notice of appeal against Philip Morris and Liggett somehow evidenced her intent to appeal the preemption issues. (Pet. at 7.)[5] That designation states: "preclusion of the many theories of defective product, risk utility and/or consumer expectations as to Philip Morris and Liggett." On their face, however, these theories do not apply to plaintiff's *misrepresentation* or *warning* claims—the claims held to be preempted.[6] Rather, they only apply to the claims which remained against Philip Morris and Liggett *after* the May 1988 preemption ruling and which the District Court dismissed on November 21, 1989. The discovery ruling alluded to in the third paragraph of the April 24, 1990 notice of appeal was likewise part of the District Court's November 21, 1989 order. In short, all the matters encompassed in petitioner's April 24, 1990 notice of appeal were directed to the Court's November 21, 1989 order.

2. Petitioner also argues that her premature notice against Philip Morris and Liggett filed on December 11,

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[5] Petitioner does not even attempt to argue that the March 29, 1990 notice of appeal directed to American contains any basis whatsoever for finding an intent to appeal the preemption issue as against American. (*See* Pet. at 7-8.) Indeed, petitioner's reliance solely on notices of appeal as to Philip Morris and Liggett further undermines any claim that she intended to appeal the preemption ruling—which applied to all three defendants.

[6] Petitioner states that Judge Skinner's November 1989 opinion "made it clear that he believed he had disposed of these claims ['defective product, risk utility and/or consumer expectations'] in his May, 1988 order." (Pet. at 7.) To the contrary, the District Court stated that it had "dismissed [in May 1988] all of the claims against Liggett Group, Inc. and Philip Morris, *except* the claim for defective design of the defendants' cigarettes." (Pet. App. at A51.) (emphasis added). The 1988 order itself is also clear on this point. (Pet. App. at A62.)

1989, which did designate the May 1988 preemption order, gave defendants adequate notice of her intent to appeal preemption issues.[7] Petitioner's argument, however, ignores her two subsequent notices of March and April 1990.[8] These notices *redesignated* many of the rulings listed in the premature notice, but specifically *omitted* the May 1988 preemption ruling. Whatever petitioner may have intended in her premature notice of appeal, her subsequent notices manifested an intent not to appeal the preemption ruling. As the Court of Appeals noted below, "appellant's complete omission of any reference to the May 1988 preemption order suggests abandonment of her quest." (Pet. App. at A6.)[9]

3. Petitioner also argues that, because respondents were able to brief the preemption issue, they have "suffered no prejudice." (Pet. at 8.) However, this Court has already held that a party's failure to comply with the requirements of Rule 3(c) "can never be 'harmless' or

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[7] It is clear that the 1989 notice against Philip Morris and Liggett was premature and of no effect. Under Federal Rule of Appellate Procedure 4(a)(4), petitioner was required to file a new notice of appeal after the trial court disposed of her motion for a new trial on March 16, 1990.

[8] Petitioner also ignores the fact that the premature notice of appeal was filed only against Philip Morris and Liggett—not American. Thus, petitoner's reliance upon her premature notice cannot begin to give notice to American.

[9] For this reason, this case differs from *Foman* v. *Davis*, 371 U.S. 178 (1962). In *Foman*, the plaintiff's first notice of appeal, later rendered premature by a post-judgment motion, designated the entire judgment. Plaintiff's second notice of appeal then mistakenly designated the post-judgment motion, not the judgment itself. This Court had no trouble concluding that the plaintiff's intent to appeal the judgment was sufficiently "manifest" to perfect the appeal. *Id.* at 181. Here, by contrast, petitioner's notices designated specific orders and parts of orders of the District Court. By redesignating some but excluding other rulings of the District Court, petitioner's second and third notices manifested an intent to limit the appeal to the rulings designated.

waived by a court." *Torres*, 487 U.S. at 316 n.3. Indeed, a "harmless error" exception would swallow the rule: an appellant could always designate a new issue subsequent to the filing of the notice of appeal and then claim that the other side had a chance to brief the issue.

4. Finally, petitioner also claims that the May 1988 preemption ruling is somehow so "inextricably intertwined" with all of the rulings in this case that "preemption is an issue which necessarily must be addressed in any appeal from rulings in the respondents' favor." (Pet. at 7-8.) But each of the orders that plaintiff did designate involved claims that the District Court had ruled were not preempted. Consequently, far from being "inextricably intertwined," preemption played no role in either the District Court's rulings or the Court of Appeals' affirmance on those issues.[10] Issues of federal preemption and issues that plaintiff designated in her notices of appeal were always treated—both analytically and procedurally—as entirely distinct matters.

For the above reasons, petitioner failed to comply with the requirements of Rule 3(c), which is jurisdictional. *Certiorari* should therefore be denied.[11]

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[10] In further support of this argument, petitioner asserts that the District Court's November 1989 ruling "restated and reincorporated the earlier preemption determination." (Pet. at 8.) The extent to which the District Court mentioned the preemption ruling, however, was simply one sentence in a brief procedural history of the case. (Pet. App. at A51.) This hardly constitutes a restatement and incorporation of the earlier preemption ruling. *Cf. Drinkwater* v. *Union Carbide Corp.*, 904 F.2d 853, 858 (3d Cir. 1990).

[11] In the event the Court does nonetheless find jurisdiction, respondents respectfully submit that the Court should hold the petition pending decision of *Cipollone* v. *Liggett Group Inc.*, No. 90-1038 (*cert. granted* March 25, 1991).

II. THIS COURT SHOULD REFUSE TO ISSUE THE WRIT TO REVIEW ISSUES OF STATE PRODUCTS LIABILITY LAW

Petitioner also challenges the Court of Appeals' interpretation of Massachusetts products liability law. Specifically, petitioner asks this Court to determine purely state law questions as to the scope of design defect liability and the relationship between breach of warranty and negligence theories. Because even petitioner concedes that these questions implicate no federal policy or issue (*see* Pet. at 18), review by this Court is not warranted. *See Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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May 1991

APPENDIX

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 86-0810-S

JOANNE KOTLER, Individually and as Administratrix of the Estate of GEORGE P. KOTLER,
Plaintiff

VS.

THE AMERICAN TOBACCO COMPANY,
Defendant

NOTICE OF APPEAL

Notice is hereby given that the Plaintiff, Joanne Kotler, Individually and as Administratrix of the Estate of George P. Kotler, hereby appeals to the United States Court of Appeals for the First Circuit from the following:

1) Interlocutory order of January 12, 1990 precluding Plaintiff's risk of defective product claim;

2) Order entered by Judge Skinner on February 28, 1990 granting the Motion of the Defendant, American Tobacco Company for a Directed Verdict on the Plaintiff's breach of warranty claim; and

3) From the final judgment entered on behalf of Defendant The American Tobacco Company on March 8, 1990, based on the divers rulings of the Court, Jury Instructions, venire and jury selections and verdict of the negligence count.

Respectfully submitted,
Plaintiffs,
By their Attorneys,

/s/ Eric A. Nissen
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I hereby certify that a true copy of the above document was served upon each attorney of record (and each party appearing pro se) by mail (by-hand) on 3/29/90.

/s/ Eric A. Nissen

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 86-0810-S

JOANNE KOTLER, Individually and as Administratrix of the Estate of GEORGE P. KOTLER,

Plaintiff

vs.

THE AMERICAN TOBACCO COMPANY, (Division of American Brands, Inc.), PHILIP MORRIS, INCORPORATED, and LIGGETT GROUP, INC.,

Defendant

NOTICE OF APPEAL

Notice is hereby given that the Plaintiff, Joanne Kotler, Individually and as Administratrix of the Estate of George P. Kotler, hereby appeals to the United States Court of Appeals for the First Circuit from the following:

1) decision of Judge Skinner of November 21, 1989 granting the Motion of the Defendant, Philip Morris for Summary Judgment, from which judgment entered on March 26, 1990;

2) decision of Judge Skinner on November 21, 1989 granting the Motion of the Defendant, Liggett Group, Inc. for Summary Judgment, from which judgment entered on March 26, 1990;

3) limitation of discovery as to Philip Morris and Liggett Group, Inc.; and

4) preclusion of the many theories of defective product, risk utility and/or consumer expectation as to Philip Morris and Liggett.

Respectfully submitted,
Plaintiffs,
By their Attorneys,

/s/ Gary Inge
NISSEN & LUMSDEN
One Court Street-44
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I hereby certify that a true copy of the above document was served upon each attorney of record (and each party appearing pro se) by mail (by-hand) on 4/24/90.

/s/ Gary Inge